

## Employment and Training Administration, Labor

## § 655.10

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(c) This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the U.S. in occupations other than agriculture and registered nursing.

(1) This subpart sets forth the procedures through which employers may apply for H-2B labor certifications, as well as the procedures by which such applications are considered and how they are granted or denied.

(2) This subpart sets forth the procedures governing the Department's investigatory, inspection, and law enforcement functions to assure compliance with the terms and conditions of employment under the H-2B program. The authority for such functions has been delegated by the Secretary of Homeland Security to the Secretary of Labor and re-delegated within the Department to the Employment Standards Administration (ESA) Wage and Hour Division (WHD). This subpart sets forth the WHD's investigation and enforcement actions.

[73 FR 78052, Dec. 19, 2008. Redesignated at 74 FR 25985, May 29, 2009]

EFFECTIVE DATE NOTE: At 74 FR 25985, May 29, 2009, § 655.1 was redesignated as § 655.5 and suspended, effective June 29, 2009.

### § 655.6 Temporary need.

(a) To use the H-2B program, the employer must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii).

(b) The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

(c) Except where the employer's need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an *Application for Temporary Employment Certification* where the employer has a recurring, seasonal or peakload need lasting more than 10 months.

(d) The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed in addition to the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

(e) The employer filing the application must maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the labor certification.

### §§ 655.7–655.9 [Reserved]

### § 655.10 Determination of prevailing wage for temporary labor certification purposes.

(a) *Application process.* (1) The employer must request a prevailing wage determination from the NPC in accordance with the procedures established by this regulation.

(2) The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing a complete *Application for Temporary Employment Certification* with the Department.

(3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.

(b) *Determinations.* Prevailing wages shall be determined as follows:

(1) Except as provided in paragraph (e) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for

labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section.

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the same opportunity and staff level within the area of intended employment, the prevailing wage shall be based on the highest applicable wage among all relevant worksites.

(4) If the employer provides a survey acceptable under paragraph (f) of this section that provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of U.S. workers similarly employed in the area of intended employment.

(5) The employer may use a current wage determination in the area determined under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*

(6) The NPC will enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer within 30 days of receipt of the request for a prevailing wage determination. The employer must offer this wage (or higher) to both its H-2B workers and any similarly employed U.S. worker hired in response to the recruitment required as part of the application.

(c) *Similarly employed.* For purposes of this section, "similarly employed" means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of comparable skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(d) *Validity period.* The NPC must specify the validity period of the prevailing wage, which in no event may be more than 1 year or less than 3 months from the determination date. For employment that is less than one year in duration, the prevailing wage determination shall apply and shall be paid the prevailing wage by the employer, at a minimum, for the duration of the employment.

(e) *Professional athletes.* In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see sec. 212(p)(2) of the INA).

(f) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPC will consider wage information provided by the employer in making a Prevailing Wage Determination. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.

(3) The survey must be based upon recently collected data:

(i) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more

than 24 months before the publication date.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(4) If the employer-provided survey is found not to be acceptable, the NPC shall inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for consideration is not acceptable, may file supplemental information as provided in paragraph (g) of this section, file a new request for a PWD, appeal under § 655.11, or, if the initial PWD was requested prior to submission of the employer survey, acquiesce to the initial PWD.

(g) *Submission of supplemental information by employer.* (1) If the employer disagrees with the wage level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there is another legitimate basis for such a review, the employer may submit supplemental information to the NPC.

(2) The NPC must consider one supplemental submission relating to the employer's survey, the skill level assigned to the job opportunity, or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, the NPC must inform the employer, in writing, of the reasons for its decision.

(3) The employer may then apply for a new wage determination, appeal under § 655.11, or acquiesce to the initial PWD.

(h) *The prevailing wage cannot be lower than required by any other law.* No PWD for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

(i) *Retention of documentation.* The employer must retain the PWD for 3 years and submitted to a CO in the event it is requested in an RFI or an audit or to a Wage and Hour represent-

ative in the event of a Wage and Hour investigation.

#### **§ 655.11 Certifying officer review of prevailing wage determinations.**

(a) *Request for review of prevailing wage determinations.* Any employer desiring review of a PWD must make a written request for such review within 10 days of the date from when the final PWD was issued. The request for review must be sent to the NPC postmarked no later than 10 days after the determination; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all materials submitted to the NPC for purposes of securing the PWD.

(b) *NPC review.* Upon the receipt of a written request for review, the NPC shall review the employer's request and accompanying documentation, including any supplementary material submitted by the employer.

(c) *Designations.* The Director of the NPC will determine which CO will review the employer's request for review.

(d) *Review on the record.* The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:

(1) Affirm the PWD issued by the NPC; or

(2) Modify the PWD.

(e) *Request for review by BALCA.* Any employer desiring review of a CO's decision on a PWD must make a written request for review of the determination by BALCA within 30 calendar days of the date of the decision of the CO. The CO must receive the written request for BALCA review no later than the 30th day after the date of its final determination including the date of the final determination.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the decision on the PWD by the NPC was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order,